

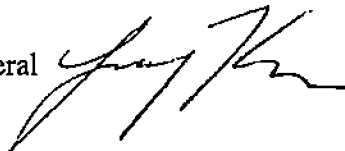


DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

MEMORANDUM

DATE: July 2, 2010

TO: Neil Mullane, Water Quality Division Administrator
Department of Environmental Quality

FROM: Larry Knudsen, Senior Assistant Attorney General
Natural Resources Section 

SUBJECT: DEQ Authority to Develop and Implement Load Allocations for Forestland Sources

Question and Brief Answer

You have asked whether the Department of Environmental Quality (DEQ) has the legal authority to develop specific load allocations (LAs) and implementation measures for forestland owners. The question assumes the following facts: A waterbody within the coastal zone fails to meet water quality standards¹ for temperature, turbidity or suspended solids. Forestland operations on properties adjacent to the waterbody contribute significantly to the pollutant load that is responsible for the failure of the waterbody to meet standards. The DEQ has determined that statewide best management practices (BMPs) implemented by the Oregon Board of Forestry (BOF) under the Forest Practices Act (FPA)² are inadequate to ensure the achievement of water quality standards.

Based on these assumed facts, the DEQ would issue a total maximum daily load (TMDL) for the waterbody along with a water quality management plan (WQMP). Under the TMDL, the DEQ proposes to assign LAs to individual property owners—including forestland owners—adjacent to the waterbody as opposed to general LAs for the nonpoint source pollution sectors as has typically been done in previous TMDLs. The water quality management plan (WQMP) issued in conjunction with the TMDL would require each source to undertake an approved implementation plan specific to the property. The DEQ also would establish "safe harbor" BMPs or other control measures that it believes to be adequate to meet the LA to the maximum extent practicable.³ In the case of forestlands, if the Board of Forestry adopts best management practices that are at least as protective as the DEQ BMPs, compliance with the BOF BMPs

¹ In this memorandum, the term water quality standard is used in its narrow sense to mean only those standards required under Clean Water Act Section 303 (33 USC §1313) and the EPA's implementing rules adopted by the Environmental Quality Commission (EQC) under ORS 468B.035 and codified in OAR chapter 340, division 41.

² ORS 527.610 to ORS 527.785.

³ It is anticipated that the DEQ would consult with Oregon Department of Forestry when developing the safe harbor BMPs and in other matters relating to TMDL development and enforcement.

would constitute implementation of the LAs. If the BOF does not adopt basin-specific BMPs or if the DEQ finds that the BOF's BMPs are not as protective as the safe harbor BMPs, the DEQ will require the forestland owner to comply with the safe harbor BMPs, or to develop its own BMPs and submit them to the DEQ for review and approval.

As discussed in the Legal Analysis section below, we believe that the DEQ does have the legal authority to develop and enforce these source specific LAs for landowners, including owners of forestlands.

Background

Under the Coastal Zone Management Act,⁴ Oregon is required to develop and submit to the U.S. Environmental Protection Agency (EPA) and the National Oceanic and Atmospheric Agency (NOAA) a Coastal Nonpoint Source Pollution Control Plan.⁵ Under Clean Water Act (CWA) Section 319, the state is also required to develop and submit to the EPA a plan for the control of nonpoint source pollution.⁶ Under coastal zone statutes and the EPA's CWA guidance, a state's coastal nonpoint source plan is to be closely coordinated with its CWA Section 319 nonpoint source plan, and also with any TMDLs developed under CWA Section 303. Essentially, the coastal plan serves to update or supplement the Section 319 plan.

The DEQ has determined that water quality in a number of coastal basins fails to meet certain water quality standards including those for temperature and suspended sediment.⁷ Further, the EPA and NOAA have asserted that the coastal plan submitted by Oregon does not adequately protect water quality with respect to pollutant loads from operations on private forest lands, specifically with respect to riparian areas, landslide prone areas, and forest roads. Unless the State of Oregon takes action to resolve these concerns, the EPA and NOAA have indicated that they will consider the state to be out of compliance with these federal laws and they will withhold federal funds under the CZMA that are currently administered by the Department of Land Conservation and Development (DLCD) and funds under the CWA that are administered by the DEQ.⁸

Legal Analysis

Under the federal Clean Water Act, Oregon is required to develop general water quality standards that are adequate to protect designated uses as well as actual uses in existence as of 1975.⁹ Under the applicable statutes, the Environmental Quality Commission (EQC) is

⁴ 16 USC § 1451 to § 1466.

⁵ 16 USC § 1455(b).

⁶ 33 USC § 1329(b).

⁷ See DEQ's CWA Section 305(b) Report at <http://www.deq.state.or.us/wq/assessment/rpt0406.htm>.

⁸ 16 USC § 1455b(c); 33 USC § 1329. In addition, a suit filed by environmental groups against the EPA and NOAA is presently pending in the U.S. Federal District Court. It seeks an order requiring the agencies to withhold grant funds based on the lack of approval of Oregon's Coastal Plan. *NWEA v. Gutierrez*, C09-017 (D. Or. 1/6/09).

⁹ 33 USC 1313 (CWA Section 303); 40 CFR 131.4(e); 40CFR 131.6. These standards must then be approved by the EPA and to the extent that a state fails to adopt standards or adopts standards that are not adequately protective, the EPA will promulgate standards for the state. *Id.* 40 CFR part 131.

responsible for adopting these standards.¹⁰ The CWA includes several strategies designed to ensure that water standards are achieved and maintained. Point sources are generally prohibited from adding pollutants to waters of the United States without a National Pollutant System Discharge System (NPDES) permit.¹¹ Such permits must include technology based effluent limits and additional water quality based effluent limits when needed to ensure that the discharge will not cause or contribute to a violation of standards. Nonpoint sources, in turn, are typically subject to state management plans required by CWA Section 319.¹² Nonpoint source management plans typically use BMPs or similar control measures to reduce pollutants to the maximum extent practicable. There are also mechanisms for addressing water pollution from federal sources and activities.¹³

Oregon's statutes create a special relationship between the DEQ and the Oregon Department of Forestry (ODF) with respect to the regulation of water quality on state and privately held forestlands. The statutes require forest operations to be conducted in full compliance with water quality rules and standards adopted by the EQC.¹⁴ For nonpoint source discharges, the BOF is directed to develop best management practices that ensure, to the maximum extent practicable, that forest operations will be conducted in a manner that will not impair the achievement or maintenance of water quality standards. Thus, the BOF essentially develops the BMPs that are the basis of Oregon's Section 319 plan for controlling nonpoint sources pollution associated with state and private forest lands in order to meet water quality standards. The statutes also provide a mechanism for the EQC to petition the BOF for more effective BMPs in the event the Commission concludes that nonpoint source discharges from forest operation being conducted in accordance with current BMPs significantly contribute to WQS violations.¹⁵ To the extent that a forest operation is being conducted in compliance with applicable BMPs, operators are generally shielded from liability for violation of water quality standards.¹⁶

Clean Water Act Section 303 has additional provisions, generally referred to as the TMDL program, designed to address situations where standards are not being met despite the Section 402 and Section 319 programs discussed above.¹⁷ The CWA requires states to identify those waters of the U.S. where standards are not being met and where the effluent limits imposed under NPDES permits and the Section 319 Nonpoint Source Management Plan are not expected to bring the waterbody into compliance with the standards.¹⁸ Under this program, the CWA requires and Oregon statutes authorize DEQ to establish a TMDL with load allocations for the various sources of pollutants and to implement these allocations via implementation plans,

¹⁰ See ORS 468B.010; 468B.035; 468B.048. The standards are codified in OAR chapter 340, Division 41.

¹¹ CWA Sections 301 and 402 (33 USC §§ 1311, 1342).

¹² 33 USC § 1329.

¹³ See, e.g., CWA Section 313 (33 USC § 1323) governing federal facilities and activities and CWA Section 401 (33 USC § 1341) addressing federal licenses and approvals.

¹⁴ ORS 527.724.

¹⁵ ORS 527.765.

¹⁶ ORS 527.770. See also ORS 468B.050 (prohibiting violations of water quality standards).

¹⁷ 33 USC § 1313.

¹⁸ 40 CFR § 130.7.

permits and orders developed to bring the water body into compliance with the water quality standards.¹⁹

The water quality statutes generally give DEQ very broad authority to implement TMDLs.²⁰ With respect to operations on forestlands, however, neither the EQC nor DEQ may "promulgate or enforce any effluent limitations²¹ or controls on nonpoint source discharges" from forest operations, unless controls imposed under the FPA are insufficient to meet the requirements of the Clean Water Act.²² The EQC's rules governing TMDLs also specify that the DEQ will look to the ODF to act as its designated management agency for implementation of TMDLs on state and private forestlands.

When the DEQ issues a TMDL, it is required to issue waste load allocations to point sources and load allocations to nonpoint sources that contribute significantly to the failure of the waterbody to meet standards.²³ These allocations, along with an accounting for natural background and a margin for safety, may not exceed the assimilative capacity of the waterbody.²⁴ DEQ also must develop plans to implement the allocations established in the TMDL.²⁵ The allocations in a TMDL are not water quality standards. They are measures designed to bring a waterbody that fails to meet water quality standards into compliance when the basic CWA provisions, e.g. NPDES permits and the Section 319 Nonpoint Source Plan are not expected to be adequate. Thus, the measures needed to implement load allocations under a TMDL for a specific basin, often will need to be more stringent than the general BMPs designed to maintain water quality standards under the Section 319 Plan.

DEQ is authorized and directed to establish load allocations and implementation requirements based on an individual sources of pollution or sectors of similar sources.²⁶ The rules specify, however, the ODF is expected to be the designated management agency that develops TMDL implementation plans for nonpoint source pollution from state and private forest operations and that it will use the authorities provided by the FPA.²⁷ Should ODF decline to act as the designated management agent, however, DEQ is authorized to establish its own implementation requirements to the extent required by the CWA and to the extent that controls adopted by the BOF under the FPA are deemed by DEQ to be inadequate to implement the TMDL. Thus in situations when the ODF is not carrying out the role of designated management agency and implementing BMPs adequate to implement the LA, DEQ may legally conclude, and in some cases likely must conclude, that implementation of its safe harbor BMPs is required.

¹⁹ 33 USC § 1313(d); ORS 468B.030; 468B.035; ORS 468B.110. Oregon's rules governing establishment and implementation of TMDLs are set out in OAR chapter 340, division 42.

²⁰ ORS 468B.010; 468B.030; 468B.110.

²¹ ORS 468B.110(2). The term "effluent limit" refers to a specific type of water quality permit condition and normally would not be used in the context of nonpoint source pollution controls. Its use in this context is somewhat unclear.

²² *Id.* (referencing ORS 527.765 and 527.700).

²³ 30 USC § 1313(d); 40 CFR § 130.7.

²⁴ OAR 340-042-0040.

²⁵ 33 USC § 1313(d)(1)(D); 40 CFR 131.7(d)(2).

²⁶ OAR 340-042-040(2)(h) and (l)(H); OAR 340-042-0080(1).

²⁷ OAR 340-042-0080(2).

Conclusion

We conclude that DEQ is required to develop and implement LAs for nonpoint sources of pollution, including, when applicable, pollutant loads from operations on state and private forest lands. In fulfilling this legal requirement, DEQ is authorized to establish allocations for individual nonpoint sources. Based on the assumptions set out above, we conclude that the law would allow DEQ to identify BMPs or other control measures needed to implement source specific LAs, including allocations for forest operations. In keeping with statutory directives and the policies in the EQC's TMDL rules, however, the BOF would be given an opportunity to adopt new BMPs or control measures that are as effective as the safe harbor BMPs and that would be implemented by ODF. If the BOF does not promulgate such implementation measures, DEQ has the authority to directly order compliance with the load allocation because such measures are required by the CWA.

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cc: Bob Bailey, DLCD
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